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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT SIMENTAL,

Defendant and Appellant.

E046303

(Super.Ct.No. SWF018805)

**OPINION**

APPEAL from the Superior Court of Riverside County. F. Paul Dickerson III,  
Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, and Jeffrey J. Koch and  
Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Gilbert Simental guilty of three counts of lewd and lascivious acts upon a child under the age of 14. (Pen. Code, § 288, subd. (a).) The jury also found true that defendant committed the offense against multiple victims within the meaning of Penal Code section 667.61, subdivision (e)(5). Defendant was sentenced to three consecutive terms of 15 years to life. Defendant's sole contention on appeal is that the trial court's failure to exclude his admissions to his church elders violated the penitential communication privilege. We reject this contention and affirm the judgment.

## I

### FACTUAL BACKGROUND

The families of two of the victims (Jane Doe 1 and Jane Doe 2) and defendant were members of different congregations of Jehovah's Witnesses in the Murrieta area. The families began a close relationship in 2003. Defendant's daughter M.S. was a best friend of Doe 2, and the families spent much time together. All three girls attended school together, and Doe 2 and M.S. were inseparable, beginning in the first grade. Defendant's wife and the Does' mother were like "sisters."

Sometime in 2005, then eight-year-old Doe 2 spent the night with M.S. at defendant's residence. During the night, defendant entered the room where the two girls were sleeping. Doe 2 was awakened by defendant touching her all over her body. Doe 2 felt defendant rubbing her vagina and buttocks and touching her underwear. Doe 2 did not initially tell anyone about the incident, but her behavior at home changed noticeably. Doe 2 stopped hugging her father and grandfather, started sleeping with her mother at

night, and did not want to be left alone. Doe 2 also told her mother that she no longer wanted to spend time at M.S.'s home.

Sometime after the above incident, Doe 2 spent the night at M.S.'s house again.<sup>1</sup> Defendant again came into M.S.'s bedroom where the girls were sleeping and touched Doe 2 all over her body.

On July 15, 2006, both Doe 1, who was one year older than Doe 2, and Doe 2 were invited to defendant's house for a sleepover with M.S. and two other girls, including Doe 3. While swimming in defendant's pool and playing a swimming game, defendant repeatedly rubbed Doe 1's upper thigh while the other girls were swimming on the other side of the pool. Doe 1 admitted that a certain kind of touching was inherent in the game but maintained that defendant touched her while both were hiding. Doe 1 also acknowledged that defendant's wife was outside at times during the game.

Doe 2 attended the pool party but refused to spend the night because she was afraid of defendant. Doe 2's mother picked her up but left Doe 1, who appeared happy, at defendant's house to spend the remainder of the night.

The four remaining girls slept on three air mattresses. During the night, Doe 1 was awakened by defendant massaging her all over her body. Defendant was touching her leg and thigh over her pajamas. Defendant also rubbed her stomach beneath her tank top and moved his hand under her bra and touched the top of her breast. Defendant also moved his hand under the top of her pajama waistband and under her underwear,

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<sup>1</sup> The record is unclear as to the exact date of this second incident.

touching her upper thigh, and then began rubbing her bare back and buttocks. Doe 1 pulled the bed covers over her body and rolled onto her stomach in an attempt to evade defendant. Defendant continued rubbing her back and buttocks. After Doe 1 said, “Hey,” defendant said, “Shh.” Defendant eventually left after Doe 1 said she had to go to the bathroom. When Doe 1 returned from the bathroom, she began packing her things to go home. Doe 1 then awakened M.S.’s mother and asked her if she would call her mother to pick her up. M.S.’s mother responded that it was too early to call Doe 1’s mother, being around two or three in the morning. Doe 1 then reluctantly returned to bed and began crying.

In late July 2006, Doe 1 and Doe 2 disclosed the touching to their mother. Both the girls were very emotional and cried throughout the conversation. Doe 2 expressed feelings of shame, anger, and sadness; she believed it was her fault that her sister was also victimized.

After the girls revealed the abuse, their mother called an elder in her congregation and explained to him the allegations made by her daughters. The elders in the congregation then called the elders in defendant’s congregation, who convened a judicial committee of three elders, to investigate the allegations against defendant. Elders in defendant’s congregation, Andrew Sinay and John Vaughn, spoke with the victims’ parents first and then spoke with defendant. Mr. Sinay and Mr. Vaughn informed defendant of the allegations and asked if they were true. Defendant admitted to touching Doe 2 in a sexual manner on two separate occasions and went into detail about the

incidents. When questioned about Doe 1, defendant admitted touching Doe 1 in a sexual manner once in the pool on July 15, 2006, and again later that evening.

The principal at the children's school was also notified of the abuse and contacted the Murrieta Police Department. Officer John Martin interviewed Doe 1 and Doe 2. The Riverside Child Assessment Team (RCAT), a group of experts in conducting child interviews, was also assigned to the case. Vera Diaz of RCAT conducted interviews of Doe 1 and Doe 2. Both girls described the abuse by defendant to Diaz.

Doe 3 later revealed that defendant had also touched her inappropriately during the pool party on July 15, 2006. Doe 3 explained that while helping her across the pool, defendant had placed his hand on her vagina. At one point, defendant had rested four fingers inside her bathing suit, directly touching her vagina while placing one finger inside her vagina.

Defendant admitted to touching Doe 2 in a sexually inappropriate manner on two occasions. When questioned about the allegations of Doe 1, defendant admitted that he may have unintentionally touched her in the pool on July 15, 2006, during a game of Marco Polo, but denied touching Doe 1 during the sleepover. Defendant also denied touching Doe 3 in a sexual manner and denied ever helping her across the pool.

## II

### DISCUSSION

Defendant contends the trial court's failure to exclude his admissions to his church elders violated the penitential communication privilege and, on this record, merits reversal.

The procedural background related to this issue is as follows: On February 15, 2008, defendant filed a motion to quash a subpoena issued to Mr. Sinay, claiming the communications about which Mr. Sinay would testify were privileged penitential communications. The court denied the motion. On February 22, 2008, defendant filed a motion to quash the subpoena of Mr. Vaughn, another elder to whom defendant had admitted the allegations against him, based on the same claim of privilege. That motion was also denied and the two witnesses were ordered to appear in court.

A hearing was later held to determine whether defendant's admissions to the church elders qualified as a privileged penitential communication. Mr. Sinay testified to the practices and policies of the church regarding the confidentiality of communications made to church elders, as well as the role of the church's judicial committee charged with investigating allegations of wrongdoing. In pertinent part, Mr. Sinay testified that one of the primary purposes of confronting defendant was to investigate the allegations, allow him to admit or deny his wrongdoing, and determine his level of repentance in order to determine the appropriate sanction. The trial court also heard testimony from the parents of Doe 1 and Doe 2 regarding the church's policies, their meetings with the church elders

from defendant's congregation, and their subsequent conversations with defendant's church elders in which Mr. Sinay told them that defendant had made a full confession to molesting their girls.

Following a two-day hearing, the trial court found the penitential privilege did not apply, as the communications were not intended to be confidential and the elders in this case felt they had no duty to keep the confession confidential. Specifically, the court stated: "In the opinion of the Court, the privilege does not apply because the conditions under Evidence Code Section 1032 have not been met. [¶] First, the Court cannot find that the defendant intended that his communications be kept confidential. The Court draws this conclusion based on the nature of the proceeding itself. Rather than approaching his pastor unilaterally, a fact-finding entity in the form of a judicial committee was formed because the elders received information from church members of another congregation that the defendant had molested their children. The evidence adduced at the hearing was that the victims told their parents about the molestation. In response, the parents approached their church elders and told them about what happened, who in turn contacted the elders of the defendant's church. These elders, Mr. Sinay and Mr. Vaughn, met with the parents and asked them about what happened. After being told what had occurred, they responded that they would look into the matter and get back to them. [¶] As Mr. Sinay stated, judicial matters involve serious wrongs, and the purpose of a judicial matter is to help determine repentance by the wrongdoer and determine if the congregation needs protection by means of disfellowship or reproof. In sum, the

defendant was approached by at least two elders of his church and confronted with accusations that he had molested children, then invited him to comment. He then confessed. [¶] . . . [¶] At this point the defendant had to know that possible sanction included disfellowship. To avoid such an outcome, the defendant had to show a requisite level of repentance to the elders. We know this because Mr. Sinay stated that one of the purposes of a judicial proceeding was to help determine an individual's level of repentance in order to gauge the appropriate punishment. [¶] Here we can infer that the defendant's primary concern was not with whether his comments and response to the allegations would be kept confidential, but rather that he showed his elders the requisite remorse so as not to be disfellowed. [¶] . . . [¶] The Court also finds that the last prong of Evidence Code [section] 1032 has not been satisfied. For one thing, Mr. Sinay stated that if an individual is disfellowed, notice is sent by form to New York [headquarters of the church] indicating the decision to disfellow, and the reasons for that decision. If the decision to disfellow has been made, an individual admitted to the allegation and no other evidence was taken. It can be reasonably inferred that New York contact the church for additional information which would, of course, be forthcoming, indeed, . . . the reason the actual statements of the accused could be included in that statement. [¶] Also, Mr. Sinay stated that notes may be kept in the office if an appeal is requested. And the official guidebook states that those notes should be turned over to as yet another committee which is handling the appeal, and that those notes may include a confession to the allegations. [¶] Mr. Sinay also conceded that the guidebook states that all important



materials must be turned over to the new committee, and that notes would be considered important.”

The Evidence Code provides a privilege for penitential communications: “Subject to [Evidence Code] [s]ection 912, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication if he or she claims the privilege.” (Evid. Code, § 1033.) Evidence Code section 1031 defines a penitent as “a person who has made a penitential communication to a member of the clergy.” And Evidence Code section 1032 defines a penitential communication as “a communication made in confidence, in the presence of no third person so far as the penitent is aware, to a member of the clergy who, in the course of the discipline or practice of the clergy member’s church, denomination, or organization, is authorized or accustomed to hear those communications and, under the discipline or tenets of his or her church, denomination, or organization, has a duty to keep those communications secret.”

We apply the substantial evidence standard to review of the trial court’s privilege determination. (*Roman Catholic Archbishop of Los Angeles v. Superior Court* (2005) 131 Cal.App.4th 417, 442 (*Roman Catholic Archbishop*).) ““““When the facts, or reasonable inferences from the facts, shown in support of or in opposition to the claim of privilege are in conflict, the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it [citations].”” [Citation.] Accordingly, unless a claimed privilege appears as a matter of law from the undisputed

facts, an appellate court may not overturn the trial court's decision to reject that claim.' [Citation.]" (*Id.* at pp. 442-443.)

In *People v. Edwards* (1988) 203 Cal.App.3d 1358 (*Edwards*), the defendant, an employee of an Episcopal Church, confessed to one of the priests at the church that she had embezzled church funds. The priest told her to talk to another priest. The defendant told the second priest what she had done and asked for his assistance in stopping payment on some checks the church had issued that could not be honored because of her embezzlement. She asked that their conversation be kept confidential. The priest told her he could either keep their conversation confidential or he could talk to church officials about the situation to help her solve her problem. The defendant agreed to the priest's disclosure of their confidential communication. Thus, in *Edwards*, the defendant herself explicitly waived the privilege. However, in ruling that the conversation was not privileged, the trial court based its decision on testimony from church officials about the tenets of the church. The trial court found that those tenets did not require the priest to keep a "secular confidence" a secret. (*Id.* at pp. 1364-1365.) The trial court drew a distinction between "problem-solving" and a "confession" seeking absolution or forgiveness, and the appellate court affirmed. (*Id.* at p. 1364.)

Additionally, the *Edwards* court determined: "Since the trial court fully considered and evaluated all of the conflicting evidence in reaching its factual determination that the questioned statement was not a penitential communication within legal contemplation, no privilege attached preventing [the priest] from otherwise

consensually disclosing the content of the nonpenitential, though private, communication to the church officials and, ultimately, to the authorities. Where such determination is supported by substantial, credible evidence, as shown, we are duty bound to uphold it. [Citations.]” (*Edwards, supra*, 203 Cal.App.3d at p. 1365.)

Of particular importance in the present case is the requirement of confidentiality. “[T]he privilege may apply only if the statements were ‘made in confidence, *in the presence of no third person* so far as the penitent is aware.’ (§ 1032, italics added.)” (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1518 (*Doe 2*)). Thus, in *Doe 2*, the appellate court ruled that the clergy-penitent privilege did not apply to statements made to a pastor by the participants in a weekend retreat held to provide “religious and spiritual healing” to the alleged victims of clergy sexual abuse, where the statements were made in the presence of other participants. (*Ibid.*) The court explained: “[T]here is no requirement that a communication ‘have as its purpose the confession of a “flawed act” to “receive religious consolation and guidance in return”’ in order to be privileged. . . . [A]lthough the statutory definition of ‘penitential communication’ that was in effect until 1967 required a ‘confession,’ the statutory definition in effect since that time contains no such limitation. (See [Evid. Code,] § 1032.) The Law Revision Commission comments state that the current definition was meant to broaden the protection afforded penitent communications. (See Cal. Law Revision Com. com., 29B West’s Ann. Evid. Code (1995 ed.) foll. § 1032, p. 359 [‘Under existing law, the communication must be a “confession.”’ [Citation.] [Evidence Code] [s]ection 1032 extends the protection that

traditionally has been provided only to those persons whose religious practice involves “confessions”].)” (*Ibid.*)

Similarly, in *Roman Catholic Archbishop*, the clergy-penitent privilege was held not to apply to documents reflecting communications that were made in “troubled-priest interventions” because the communications “were routinely shared by Cardinal Mahoney, whoever happened to be the current Vicar for Clergy, and sometimes other Archdiocese employees as well.” (*Roman Catholic Archbishop, supra*, 131 Cal.App.4th at pp. 444-445.) The court in *Roman Catholic Archbishop* observed that before the enactment of the current penitent-clergy privilege in Evidence Code sections 1030 through 1034, “the privilege was defined by Code of Civil Procedure section 1881, subdivision (3), which provided, ‘A clergyman, priest or religious practitioner of an established church cannot, without the consent of the person making the *confession* be examined as to any *confession* made to him in his professional character in the course of discipline enjoined by the church to which he belongs.’ . . . The current statute makes no reference to confessions, and instead provides an evidentiary privilege for “penitential communication.”” [Citation.]” (*Roman Catholic Archbishop*, at p. 443.)

Thus, the definition of penitential communications in the current Evidence Code section 1032 expands the outside limit for privileged communications beyond the former statute. Nonetheless, within the current definition, the statute further requires that the member of the clergy to whom the disclosure is made has a duty “under the discipline or

tenets of his or her church, denomination, or organization” to keep such communications secret. (Evid. Code, § 1032.)

The burden of proof for a claim of clergy-penitent privilege is described in Evidence Code section 917, subdivision (a): “If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the . . . clergy-penitent [or] husband-wife . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.” However, “the privilege-claimant ‘has the *initial burden* of proving the *preliminary facts* to show the privilege applies.’ [Citation.] ‘Once the claimant establishes the preliminary facts . . . , *the burden of proof shifts to the opponent of the privilege*. To obtain disclosure, the opponent must rebut the statutory presumption of confidentiality set forth in [Evidence Code] section 917[, subdivision (a).] . . . Alternatively, the opponent of the privilege may show that the privilege has been waived under [Evidence Code] section 912 . . . .’ [Citation.]” (*Roman Catholic Archbishop, supra*, 131 Cal.App.4th at p. 442, fns. omitted.)

Having reviewed the statutory scheme for the clergy-penitent privilege, we turn to our analysis of the application of the privilege in the present case. Here, there was no evidence that the communication was in the form of a confession seeking absolution or that defendant intended that the communication be kept confidential. As the evidence shows, defendant did not seek out the elders to confess his sins and seek absolution,

rather, the elders approached defendant as a fact-finding entity after they had received information that defendant had molested children. After being approached by at least two elders from his congregation, namely, Mr. Sinay and Mr. Vaughn, and questioned about the allegations made against him, defendant was invited to express his side of the story and ultimately confessed. Defendant's admissions were a result of the judicial council's formal inquiry into the allegations against him. In fact, Mr. Sinay testified that one of the main purposes of a judicial council proceeding is to help determine an individual's level of repentance and to protect the congregation. Therefore, as the trial court noted, defendant's primary concern was not whether the communication would be kept confidential, but rather that he displayed a sufficient level of remorse to avoid being disfellowed. The trial court's well-reasoned statements are aptly sound.

Contrary to defendant's suggestion and consistent with *Doe 2*, there is nothing in the trial court's ruling suggesting it believed the privilege did not apply because defendant's statements were not confessional in nature. Rather, the lower court rejected the assertion of the privilege because the statements were not intended to be made in confidence, nor was there an expectation of confidence. In addition, as the trial court found, the evidence clearly shows that under the church's judicial discipline process, the elders were under no duty to keep the communications secret. Indeed, the evidence shows that the tenets of the Jehovah's Witness faith require that the statements made to the judicial committee be disclosed to the appellate committee, as well as to their New York headquarters, if an appeal is requested following a disfellowship. Mr. Sinay

testified that it is the practice of the judicial committee, if a member is disfellowed, to send notice to the Jehovah's Witness headquarters in New York indicating both the decision to disfellow and the reasons behind that decision, including any admission made by a member. Mr. Sinay also asserted that the notes of the judicial council meetings are taken and kept in the office and are disclosed to an appellate committee should a disfellowship be appealed, and that those notes may include the contents of an admission. Mr. Sinay further stated that the results of a judicial proceeding are "public knowledge," indicating that the purpose of the judicial process of the church is to determine guilt or innocence and to take the appropriate action to protect the congregation; not to keep the results of the investigation strictly confidential. The fact that defendant was not disfellowed and the branch office in New York was not notified is of no consequence as the evidence showed that confidentiality was neither required nor expected by the parties.

Furthermore, the victims' mother testified that the committee told her they were initiating an inquiry into her daughters' allegations and would get back to her with anything they discovered. The victims' parents testified that Mr. Sinay had contacted them and told them that defendant had made a full confession. Though the elders did not disclose the details of the confession, it was clear as to what the confession referred to. Similarly, the fact that an elder told the victims' parents that he had spoken to defendant suggests, as the trial court concluded, "that the duty the elders felt in this case was not to keep communications secret, but rather to assuage concerns the victims' parents had about what the defendant had done and to grant assurances to the extent possible, that the

matter was being handled internally by the church.” The evidence here clearly shows that the duty of the elders in this case was focused on investigating the allegations against a member of their congregation. The duty of the elders in convening the fact-finding committee was to discover the truth and disclose it to the congregation, or to the victims if necessary, and was not to keep the communications confidential.

We conclude, therefore, that the trial court did not err in finding the penitential communication privilege did not apply to statements defendant made to church elders, Mr. Sinay and Mr. Vaughn.

In any event, even if we assume, for the sake of argument, the privilege did apply, any error would be harmless. A defendant suffers prejudice from the erroneous admission of privileged communications when it is “reasonably possible that a reasonable jury would have rendered a different verdict had the evidence been excluded. [Citation.]” (*People v. Clark* (1990) 50 Cal.3d 583, 623.) Here, the evidence was brief. Moreover, contrary to defendant’s contention, there was overwhelming evidence of defendant’s guilt without the elders’ testimony. Both the victims and their mother testified as to the specific incidents that formed the basis of the charges. The prosecution also presented the testimony of Doe 3 and her mother, who also described how she had been touched by defendant at the pool party. Defendant himself also testified about his admissions as to Doe 2. In light of this extensive testimony establishing defendant’s guilt, the challenged evidence pales to insignificance. Even if the challenged evidence had been excluded, it is not reasonably likely the jury would have reached a more favorable determination.



III

DISPOSITION

The judgment is affirmed.

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RICHLI  
J.

We concur:

HOLLENHORST  
Acting P.J.

McKINSTER  
J.